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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF WYOMING**

[illegible]

MEMORANDUM OF LAW REGARDING SCOPE OF EXPERT TESTIMONY

Creditor Rich Dad Operating Company, LLC (“RDOC”) hereby provides a memorandum of law regarding the scope of expert testimony that may be heard at the Court’s hearing on April 2, 2019 (the “Hearing”) regarding Trustee’s Motion to Approve Settlement of Disputes Between the Trustee and Robert Kiyosaki, Kim Kiyosaki, Pele-Kala Corporation, Cashflow Technologies, Inc., BI Capital, LLC, and Rich Dad Operating Company, LLC (Doc. 354) (the “Objection”). Any expert testimony that may be presented at the Hearing is limited to those opinions that were previously disclosed.

I. Introduction

RDOC recently learned that Creditors Learning Annex Holdings, LLC, Learning Annex, LLC and Learning Annex L.P. (collectively, “Learning Annex”) have subpoenaed Patrick M. Donovan (“Donovan”) to appear as a witness at the Hearing.¹ Presumably, Learning Annex intends to present Mr. Donovan’s opinions as evidence at the hearing.

Donovan was retained and disclosed by Trustee Tracy L. Zubrod (the “Trustee”) as an expert witness to testify on various issues in the adversary action — the subject of Trustee’s Rule 9019 Motion — that is now pending before the United States District Court for the District of Wyoming as Case No. 16-cv-00217 (the “Action”). Donovan’s opinions in the Action were disclosed in two reports: his primary report (dated March 30, 2018; the “Donovan Report”) and his report rebutting the opinions of Lynton M. Kotzin (dated June 15, 2018; the “Donovan Rebuttal”). These are the only disclosures regarding Donovan’s opinions; Learning Annex has not disclosed any additional opinions held by Donovan.

Lynton M. Kotzin (“Kotzin”) was retained by RDOC (and other Defendants in the Action)

¹ The subpoena served on Donovan is attached hereto as Exhibit A.

to offer expert testimony in the Action. Mr. Kotzin's opinions in the Action were disclosed in two reports: his primary report (dated March 30, 2018; the "Kotzin Report") and his report rebutting the opinions of Donovan (dated June 15, 2018; the "Kotzin Rebuttal").

In this Rule 9019 matter, we have the curious circumstance of Learning Annex calling as a witness an expert it did not engage. This expert—Donovan—may also be used as a witness by the party that engaged him—the Trustee. Because of these circumstances, RDOC has identified Kotzin as a witness for this Rule 9019 matter.

II. Discussion

While a party may generally call an opposing party's expert as a witness, it may not solicit testimony that is beyond the scope of already-disclosed expert opinions. *See, e.g., Lexington Ins. Co. v. Horace Mann Ins. Co.*, 11 C 2352, 2015 WL 5174159 (N.D. Ill. Aug. 27, 2015) (allowing a party to call an opposing expert but significantly limiting the testimony). The court in *Lexington* reasoned:

The Court agrees that as a general matter, Rule 26(a)(2) would not necessarily preclude [proponent] from calling [opposing experts] in its case in chief despite the fact that Horace Mann did not disclose them as potential witnesses. Nothing in that rule or the cited cases, however, supports [proponent's] assertion that it had free rein to elicit opinions from [opposing experts] on topics beyond the scope of their rebuttal reports and then seek to affirmatively use those alleged opinions without complying with any disclosure obligations under Rule 26. As discussed earlier, the very purpose of Rule 26 would be thwarted if parties could ask rebuttal experts questions to elicit new opinions that have nothing to do with the opinions expressed in their reports, especially when the deadline for disclosing expert opinions has long since passed.

Lexington, 2015 WL 5174159, at *14.

This comports with the general rule that undisclosed expert opinions are inadmissible. *See* Fed. R. Civ. P. 26(a)(2)(B) (requiring all opinions to be contained within a report); Fed. R. Civ. P. 37(c)(1) (containing a self-executing exclusion for undisclosed

opinions); *Anderson v. Hale*, No. CIV-02-0113-F, 2002 WL 32026151, at *2 (W.D. Okla. Nov.4, 2002) (“[T]he combined effect of Rule 26(a)(2)(B) and 37(c)(1) is that he who fails to provide a comprehensive expert report does so at his peril.”); *see also Daberkow v. United States*, 2008 WL 4755852, at *4 (D. Colo. Oct. 29, 2008) (“Plaintiff should be precluded from presenting any improperly undisclosed opinions from either witness”); *King v. Ford Motor Co.*, 209 F.3d 886, 900–901 (6th Cir. 2000) (excluding expert testimony because it exceeded scope of expert reports and opposing party was prevented from preparing for this “surprise” testimony).

RDOC does not object to Donovan (and Kotzin) testifying at the Hearing regarding the opinions disclosed in their expert reports and rebuttals, even though it is arguably “neither necessary nor appropriate” in the context of a Rule 9019 hearing. *Geltzer v. Original Soupman, Inc. (In re: Soup Kitchen Int’l, Inc.)*, 506 B.R. 29, 30 (Bankr. E.D.N.Y. 2014). RDOC objects, however, to any attempt by Learning Annex to solicit testimony from Donovan or Kotzin that is outside of those expert reports, which would constitute inadmissible and undisclosed opinions. Notably, Donovan and Kotzin have not, for example, disclosed opinions (and may not testify) on the following issues:

- The reasonable settlement value of the Trustee’s claims
- The probability of succeeding on the Trustee’s claims
- The value of the Trustee’s claims
- The difficulty of judgment collection
- The probability of claims surviving summary judgment

Such opinions, and other undisclosed opinions, would be improper and must not be allowed

at the Hearing.

III. Conclusion

The Court should accordingly be mindful of the testimony sought by Learning Annex so it does not invite opinions that have not been disclosed in the Action. Only disclosed opinions may be the subject of testimony, and the Court should preclude testimony that strays.

Dated: March 26, 2019

Respectfully submitted,

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By: /s/ John F. Young

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 26, 2019, I served by prepaid first-class mail a copy of the attached document on all parties against whom relief is sought and those otherwise entitled to service pursuant to the FED. R. BANKR. P. and the Wyoming LBR at the following addresses:

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